

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit. 10

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EDWARD E. BRAMLETT, CHARLES R. BRAMLETT, GORDON  
F. HATCHER, E. DANA BROOKS, JULIUS GOLDFARB,  
MEYER GOLDFARB, V. R. JAMES and E. G. HEIDEN,  
*Appellants.*

*vs.*

NATIONAL UNIT CORPORATION, a corporation,  
*Appellee.*

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PETITION FOR REHEARING.

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In coming to the conclusion that claims 2 and 3 of the patent in suit are invalid for anticipation, the Court failed to give any consideration to several very important circumstances.

These are (1) an erroneous interpretation of the *combination* claimed in the patent<sup>1</sup>; and (2) failure to appreciate the significance of the activities of appellants who copied the combination; and in spite of the fact that the alleged anticipating disclosures were available to them.

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<sup>1</sup>It is well understood that the entire combination must be considered in construing a claim.

"We are of opinion that nothing in the prior art cited by the defendant anticipates the Nelson invention; that is, the *complete* combination of elements described in claim 2 of the Nelson patent." (Italics ours.)

Alemite Mfg. Corp. v. Rogers Products Co., 42 Fed. (2d) 648 (C. C. A. 3), page 651.

The Court discusses at some length the Coffin patent which was introduced in evidence by the appellants. This patent was not seriously urged as an anticipation by appellants.<sup>2</sup> The Court throughout its opinion, implies that the claims in issue rather broadly cover a combination of a stand, a container, and a feeding device. But the claims include important and vital limitations that clearly lend patentability to them. Of course, appellee does not contend, and cannot contend, that its patent covers any and all combinations of these necessary elements.<sup>3</sup> Claim 2, for example, includes, among important limitations, *a restraint within the stand, cooperating with the feeding device*, that is attached and carried by an *invertible* container.

The Court seems to assume that any efficient assembly for distribution of mayonnaise in small batches, such as provided by Coffin, fulfills all the requirements of the appellee's invention. Appellee's patented structure is not intended to operate *merely* as such a distribution assembly.

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<sup>2</sup>Appellants' discussion of this Coffin patent consists of but two sentences in the appellants' briefs:

"Coffin screws his dispenser into the frame threaded collar 5."  
(Appellants' Opening Brief, p. 7.)

"Coffin has a stand, container and dispenser screwed into collar of the stand which has the container screwed in above." (*Ibid*, p. 16.)

The closing brief of appellants does not even mention the Coffin patent.

The appellee accordingly had at least a partial excuse for not dwelling at length on this patent.

<sup>3</sup>In addition to the half-dozen or so patents included in the record, there are a very wide variety of devices in the prior art for ejecting liquids, granular or powdered substances, or the like, in conjunction with stands. In an art so crowded as this, departure therefrom, imitated by a business rival, is strong evidence of novelty, and lack of anticipation.

So far as *that* broad problem is concerned, it is in all likelihood capable of being solved without incorporating the structural limitations of the claims. But the patentee's problem was one involving the use of a simple, standard form of container, *separate* from the feeder, which could be very conveniently filled at the factory and transported to the desired localities, such as grocery or delicatessen stores, and there readily assembled with a feeder device and very effectively and conveniently and sufficiently supported in a specific type of stand.<sup>4</sup>

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<sup>4</sup>The limitations in claim 2 that contribute to this may be briefly discussed, without any attempt to be exhaustive (leaving that to further argument if necessary).

The container is stated to be one that is "provided with an enlarged base and a restricted *top* portion having an opening therein" (italics ours). This form of container makes it easy to fill at the factory, the enlarged base lending stability to the container during the operation of filling and during transportation. The *top* (which is to be placed in inverted position in the stand) is defined as the one carrying the feeding device; while before the opening served as a filling aperture, now with the stand it serves as a discharge aperture.

The stand has "an enlarged bottom and a restricted top." This is for the purpose of providing a stable support even after the container is inverted, a position in which the container (especially when filled) needs support.

An important element of the combination is the "restraining means *within said stand* adapted to engage with (said) *feeding device* when said container and feeding device attached thereto is introduced in *inverted position into the stand*" (italics ours). This element is worthy of further comment. By making the restraint cooperate with the *feeding device* rather than with the container *per se*, the container may be made of simple form without extraneous grooves or projections or other devices. The feeding device is adapted (by being removable) to cooperate with many containers. It is especially constructed for its cooperation with the restraining means; thus there is a considerable saving in cost, because attention in this regard need be paid only to the relatively few feeding devices, rather than to the numerous containers. The restraint being within the stand, no unsightly parts are visible even when the stand is placed on a counter.

Further, the claim specifies that the restraining means engages "said feeding device when said container and feeding device attached thereto is introduced in inverted position into the stand through said restricted top." Thus the securing of the container assembly into the stand is obtained by a simple downward movement of the assembly through the top of the stand.

The support for the assembly in proper distributing position is thus obtained by the aid of two vertically separated places where contact is

That appellee's structure is meritorious is not seriously contested. It was immediately accepted by the trade. The appellants, in active competition with appellee's licensee, took advantage of this immediate acceptance and paid tribute to the meritorious ideas embodied in appellee's device by abandoning other forms of apparatus and copying appellee's structure to replace these other forms (See Footnote 7, *infra*). The Coffin device was available to appellants; but they did not copy *that* structure, nor any of the other old structures incorporating a stand, a

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established. These two places serve to keep the assembly securely in place, without any unsightliness.

As stated by appellee heretofore, it is of course possible to utilize other means for rigidly supporting the inverted container assembly. But the patent is definitely limited to one in which (1) the top of the stand cooperates with the container, and (2) there is a cooperation between a restraint *in the stand*, and the *feeding device*. The advantages of this arrangement are apparent, once these features are mentioned. It is just these features that are imitated in the accused device.

Viewed in this light, it is easy to appreciate why the Commissioner of Patents as well as the District Court had no difficulty in concluding that the claims were valid over the prior patents. For example, Coffin, which is most heavily stressed in this Court's opinion, is after all, so far as the evidence herein is concerned, a mere paper patent. Therein the assembly of container and feeding device is held in place by holding the rim of collar 5 against a V-shaped seat 7a (Fig. 6, page 48, Book of Exhibits). The support is accomplished at but *one* point, and that, not by a vertical downward movement, but by a horizontal movement of the holt 6 into the top 7 of the stand. The collar 5 operates to join the container 1 to the feeding device 9. *It is not a part of the stand*; there are no two vertically spaced points of contact, one on the container and one on the feeding device. The container itself is not in *inverted* position on the stand as called for by the claim. The top of the container 1 of Coffin is located where the cover 2 is placed. It is not intended to fill the container 1 through its lower opening and then to *invert* it. The *inverted* position is positively set forth in the claim. Nor can Coffin be utilized commercially for transporting filled containers separate from the feeding device.

The remaining patents all fail to show, in one complete combination, (1) an invertible scaled container and feeder assembly; (2) a stand cooperating at its top with the container; and, finally (3) a restraint *in the stand* and cooperating *with the feeding device*. It matters not whether some of them could utilize *pumps* instead of taps or faucets; this combination alone would still fail to produce the combination just outlined.



container and a feeder. Many of the appellants' devices replaced those of appellee's licensee. This copying was of the *entire* combination—the vital features *supplementing* the essential elements of a stand, a container and a feeder. The entire assembly as defined in the claims was approached as closely as appellants dared.<sup>5</sup>

As regards the question of patentability, these considerations in addition to others now to be mentioned, ought to have been given great weight in deciding the case. The patent was granted by the Commissioner of Patents in spite of the existence of all the prior art.<sup>6</sup> And furthermore, the District Court confirmed the action of the Commissioner of Patents by finding the claims valid over this prior art. This *fact* finding should not be ignored.

Authorities substantiate that where the patented device, after going into commercial use, was copied and followed by an alleged infringer, who discarded other devices in

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<sup>5</sup>A mere comparison of the appellee's and appellants' devices suffices to show wilful copying. No apparatus shown in the prior art approaches anywhere near as close to appellee's device as the Food Craft apparatus. The appearance alone is distinctive.

Attention is also called to Crofut [R. pp. 94 and 95]; Hahn [R. pp. 100, 101]; and Schneider [R. p. 106].

<sup>6</sup>It must be presumed herein that the Commissioner of Patents *did* have all of the available prior art before him, because appellants introduced no evidence to the contrary; not even the file wrapper history of the patent.

its favor<sup>7</sup>, this bears heavily in favor of validity; and especially where the lower tribunals have already resolved any possible doubt in favor of the patent.<sup>8</sup>

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<sup>7</sup>The testimony of Julius Goldfarb, one of the appellants, beginning at page 139 of the record is pertinent in this regard.

"There were other dispensers for mayonnaise on the market before Kermin" (page 140).

"One of the first types of mayonnaise dispensers that I had involved the use of an air pump. *I discarded that type of dispenser the early part of 1935.* \* \* \* Plaintiff's Exhibit No. 7 is the Food Craft dispenser (the accused structure). *In October, 1935, was the time we first came out with a complete unit, and it is here 7. Up to that time we used an air pump arrangement.*" (Italics ours; page 142).

It is significant to note that appellee's licensee began putting out its devices in March, 1935 [Tr. p. 66]. There is thus a remarkable coincidence between the time that the patented structure went into commercial use and the time when the Goldfarbs, some of the appellants, went on the market with their infringing device.

<sup>8</sup>Without any attempt herein exhaustively to set forth all pertinent authorities, the following may be mentioned:

Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., 48 Fed. (2d) 73 (C. C. A. 6);

Overman Cushion Tire Co., Inc. v. Goodyear Tire & Rubber Co., Inc., 40 Fed. (2d) 460 (C. C. A. 2);

Trussell Mfg. Co. v. Wilson-Jones Co., 50 Fed. (2d) 1027 (C. C. A. 2). Therein on page 1030 it is said:

"Not only does a patent carry a presumption of validity, but the defendant's own efforts to accomplish the same result and escape infringement adds something of persuasion in favor of invention."

W. Bingham Co. v. Ware, et al, 46 Fed. (2d) 33 (C. C. A. 6):

"\* \* \* patentability is not defeated by feasibility of effecting the same result by the changing of existing structures. \* \* \* It is, however, simple of construction and satisfactory—more satisfactory than any that had heretofore been developed. That it was an advance is evidenced by the copying and adoption of it by others engaged in the same business."

Trico Products Corporation v. Apco-Mossberg Corporation, 45 Fed. (2d) 594 (C. C. A. 1) At page 598 the court says:

"As bearing on the novelty of the plaintiff's invention, the manner in which the public adopted it and their competitors copied it, weighs heavily in favor of its patentability; and *favorable action by the Commissioner of Patents and a finding by the District Court on this point requires clear proof to the contrary.*" (Italics ours.)

Black & Decker Mfg. Co., et al. v. Baltimore Truck Tire Service Corporation, 40 Fed. (2d) 910 (C. C. A. 4). At page 914 the court says:

"And in addition to this is the presumption arising from the imitation of the patented article by the manufacturer of the alleged infringing device."

McKee, et al. v. Graton & Knight Co., 87 Fed. (2d) 262 (C. C. A. 4). At page 264 the court says:

"\* \* \* and to this should be added also the presumption which arises from defendants' imitation of the patented article after its success had been assured."

Appellee respectfully urges that it should be given an opportunity to present an argument, rendered necessary by the unforeseen bringing to light of questions which were not seriously treated by appellants. Apparently if appellee succeeds even in so much as creating a *doubt* in this Court's mind on the question of invention, it would suffice. Considerations must be given to the limitations in the claims here urged, the high degree of utility of the device, and appellants' actions in discarding other devices in preference to the patented structure.

Respectfully submitted,

JOHN FLAM,

*Solicitor for Appellee.*

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**Certificate.**

This petition is in my judgment well founded and it is not interposed for delay.

JOHN FLAM.

